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HAROLD B. WILLEY, C

No. 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

FEDERAL POWER COMMISSION,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Jurisdiction

This Court has issued a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, remanding, with instructions to modify, an order of the Commission issued September 27, 1950.

This brief is submitted by the State of New York as *amicus curiae* in accordance with the provisions of Rule 27(9) of the Rules of this Court in order to set forth the views of the State of New York upon questions of title to water rights in the Niagara River.

Authority is vested with every right and power of the State, whether proprietary or sovereign, in the Niagara River. (Laws of 1951, ch. 146.)

The United States Senate ratified the treaty of February 27, 1950 on August 9, 1950 but approved a reservation that "no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress". Bills have been introduced which contain a finding that "it is most desirable that development of hydro-electric projects be made by private enterprise * * *", and which direct the Federal Power Commission to issue a license as soon as practicable "to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of any State * * *" (H. R. 2289, H. R. 4351 and S. 689).* These bills depart from the policy of the Federal Power Act which grants a preference to applications by States (Section 7), and from the policy of the State of New York for public development of hydro-electric resources.

Although the State is not a party to this proceeding and would not be bound by it, the State desires to call the attention of the Court to the nature of its rights in the waters of the Niagara River.

Statement

The State of New York owns the bed of the Niagara River and the American bank of the river from the Chippewa-Grass Island Pool above Niagara Falls to the Maid of the Mist Pool below. The State also owns the

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* Bills have also been introduced providing for development by the State of New York (S. 1971, H. R. 5335) and returning full jurisdiction to the Federal Power Commission (S. 2599).

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islands in the Niagara River on the Fall's edge. Therefore the entire fall of water which is the subject of controversy here flows in its natural condition, across, over, between and along lands owned by the State of New York.

No private owner has ever held title to the bed of the river. The banks of the river were acquired in the name of the State by the Niagara Reservation Commission created in 1883 (Laws of 1883, Ch. 336). The lands were thereafter set aside in perpetuity for park purposes (Laws of 1885, Ch. 182). The first steps by the Federal Government to protect the Falls came in 1906 (Burton Act, 34 Stat. 626).

The water rights purchased by the respondent consist of rights to divert waters upstream from the Falls and to discharge waters below the Falls thereby depriving the State Reservation of the full flow of the River in its natural condition. A sketch showing the geographic relationship of these diversions and the Falls appears at page 491 of the record.

The fall of water thereby diminished is valuable to the State Reservation. Under the statute the Niagara Reservation Commission was to acquire lands "for the purpose of preserving the scenery of the Falls of Niagara and of restoring the said scenery to its natural condition" (Laws of 1883, Ch. 336). As the Commission has reported, "the land of the Reservation was purchased by the State only as a setting for the Falls of Niagara" (29th Annual Report of the Niagara Reservation Commission, p. 66). On another occasion the Commission called the attention of the State Legislature to "the manifest inconsistency of * * * schemes to make use of * * * the water power of the Falls, for manufacturing purposes" (6th Annual Report, p. 58).

The International Paper Rights

The International Paper Company's rights derived from a contract with a company first formed three years after the establishment of the State Reservation (Laws of 1886, Chap. 83). Apparently the new company first proposed to exploit the Falls itself. As the Reservation Commission put it—

> "Defeated in the attempt to erect power works immediately under the Falls, enterprising promoters soon devised a plan of evading the uncompromising position of the Reservation Commissioners by taking water from the Niagara River above the Reservation and conducting it by subterranean tunnel to the river below the Falls, utilizing its power in transit." (19th Annual Report, p. 67)

We shall show that the new company had no right as a riparian owner upstream from the Falls to deprive the State Reservation of waters by draining these waters into a new channel, since the State, irrespective of its sovereignty, had a proprietary right to the full flow of the river in its natural condition. The company, however, did not rely on its riparian rights but sought a grant of authority from the State Legislature. Its charter was several times amended (Laws of 1889, Chap. 109; Laws of 1891, Chap. 253; Laws of 1892, Chap. 513; Laws of 1893, Chap. 477). The 1891 Act permitted the construction of works upon lands in the River. The 1892 Act permitted diversion of an amount of water sufficient to produce 200,000 effective horse power.

The respondent has failed to show that it had any riparian rights to make this diversion. Its rights derive from the grant from the State of New York which, as we shall see, could amount to no more than a temporary permit or license.

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Furthermore it appears both in the initial lease (169) and diagram (183) and the deed of 1896 (185-186) that essential works were constructed on land under water which belonged to the State of New York. The Legislature never granted and could not grant an indefeasible title to these lands under water. At most it could permit their use on a temporary basis.

The rights amounted in substance to an agreement by the promoters of the Niagara Falls Power Company to divide up the privileges conferred on a temporary basis by the State of New York.

The Pettebone-Cataract Rights

The Pettebone-Cataract diversion commenced some years before the acquisition of the State Reservation. The various conveyances upon which these rights depend are not in the record. Like the International Paper diversion it resulted in depriving the Niagara Falls and the State Reservation of the full flow of water.

Whatever proprietary rights may have existed were destroyed by the State's condemnation of the bank of the Falls in 1885. The State thereby acquired not merely the Reservation itself but "all water rights * * * easements and appurtenances of every name and nature whatsoever" and had the usual right of a riparian owner to the full flow of the stream in its natural condition.

In 1895 the Niagara Reservation Commissioners requested the opinion of the Attorney General of New York as to whether the Hydraulic Company (which carried water by canal to the Pettebone-Cataract Mills) could increase its diversion, then estimated at about 200,000 cubic feet per minute (3333 cfs) as compared with the 6,500 cfs later authorized under the Burton Act. (484)

The Attorney General ruled as follows:

> "The objects and purposes of the statutes creating the Niagara Reservation were to preserve a great natural waterfall and its environments for the enjoyment of the people of this State. In fact, the statutes themselves declare that the commissioners shall take all proper steps to restore, and afterwards to preserve, the scenery as nearly in its natural state as possible. The flow of water over the falls is an essential element in the preservation of the scenery, and if it can be shown (as I am informed it can be) to be the fact that the diversion of the large quantities of water through the canal of the Niagara Falls Hydraulic Power and Manufacturing Company has a diminishing effect upon the flow of the water over the falls, the diversion is a nuisance and can be restrained." (1895 Op. Atty Gen. pp. 328-329)

A few months later the New York Legislature adopted an act (Laws of 1896, Chap. 968) permitting the Hydraulic Company to divert such quantity of water as might be drawn through a canal 100 feet wide and 14 feet deep.

Here, again, the source of the rights was the legislative grant and not the ownership of riparian lands. Under the law of New York these grants are revocable at will and constitute at best a temporary permit to use waters to which the State retains the full proprietary title.

Subsequent Enactments

At the same session of the Legislature which authorized the diversion of the Hydraulic Company, a Senate resolution was passed as follows:

> "Whereas, The State of New York acquired at considerable cost the property known as the State Res-

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ervation at Niagara, and by legislative enactment decreed that it should 'forever be reserved by the State for the purpose of restoring the scenery of the Falls of Niagara to and preserving it in its natural condition,' and some have apprehensions that diversion of the waters of the great lakes and those of the upper Niagara river may injuriously affect the sublimity of the Falls; therefore be it

"Resolved, That the Government of the United States be requested to initiate such proceedings as may be deemed expedient to secure the permanent exemption of the great lakes and upper Niagara river from such diversions, and to regulate the use of the waters of the lakes and their connecting waters and those of the St. Lawrence river so far as they are international boundaries." (21st Annual Report of the Niagara Reservation Commission, p. 179)

On March 17, 1904, the New York Senate adopted the following resolution which was subsequently adopted by the Assembly

"Whereas The grants of water power at Niagara Falls heretofore made by Canada and the State of New York, have established a policy in relation to the waters of the Niagara river, the indiscriminate pursuit of which may seriously impair, if not destroy, the beauty of this wonder of nature;

"Whereas, There can be no adequate protection of the Falls against injurious grants, except from the united action of the United States and Great Britain.

"Resolved, (if the Assembly concur) that this legislature memorialize the President of the United States. to open negotiations with Great Britain, for the purpose of framing a treaty which shall prevent the diversion of wate s in the Niagara river, injurious to Niagara Falls as they now exist." (Id. pp. 179-180)

Two years later the Burton Act was enacted by Congress (Act of June 29, 1906, 34 Stat. 626). Ths act limited the American diversions from the Niagara River for power purposes to 15,600 Cfs. Predecessors of the respondent were issued permits by the Secretary of War in the total amount of 15,100 Cfc (484).

Thereafter the United States and Great Britain entered into the Boundary Waters Treaty of 1909. This treaty provided that—

> "So long as this Treaty shall remain in force, no diversion of waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.
>
> "The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.
>
> "The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second." (Art. V, 442).

It is clear that the Burton Act and the Boundary Waters Treaty of 1909 were not intended to confirm private rights in the Niagara River or to destroy the rights of the State of New York in the Niagara River. The purpose was to prevent the impairment of the beauty of Niagara Falls by excessive diversion of water for power purposes. The Burton Act specifically provided that—

> "Nothing herein contained shall be held to confirm, establish, or confer any rights heretofore claimed or

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exercised in the diversion of water or the transmission of power." (418-19)

The Treaty did not confirm any diversions but simply stated that a contracting party "may authorize and permit" diversion. Moreover a specific reservation of the existing rights of state and provincial governments was contained in Article II thereof—

> "Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters."

Since the State of New York had undertaken to preserve the Falls in its natural condition, and had invested the money required for that purpose these measures should be interpreted as additional sanctions for the protection of the State's interest and not as devices to destroy it.

The necessity of the Treaty is particularly evident. The existing diversions on the Canadian side, as the Treaty indicates, were almost twice those on the American side. Moreover, the American Falls has greater need of the full flow of the river since it receives only 1/10th of the stream as compared with the 9/10ths passing over the Horseshoe Falls adjacent to the Canadian shore. (See: Joint Hearings before the Subcommittee on Flood Control and Rivers and Harbors of the Committee on Public Works of the United States Senate and the Committee on Public Works of the House of Representatives, 83d Cong., 1st Sess., on S. 689, H. R. 2289 and H. R. 4351, p. 16). Even this small proportion was obtained by constructing

a submerged weir during the years 1942-1944 which nearly doubled the flow (See: *Possibilities for Redevelopment of Niagara Falls for Power,* Bureau of Power, Federal Power Commission, 1949). The Burton Act limited the extent to which the State, as proprietary owner, or its permittees, could divert waters for power purposes. It did not purport to vest any proprietary right in the United States. The Treaty imposed similar limits on both American and Canadian Authorties. It did not purport to affect any proprietary title.

Shortly after the Burton Act was passed, Governor Charles Evans Hughes, in a message to the New York State Legislature, said that the water power of the State "should not be surrendered to private interests but should be preserved and held for the benefit of the people." The Legislature thereupon enacted Chapter 569 of the Laws of 1907 which directed the State Water Supply Commission, then only a year old, "to devise plans for the progressive development of the water powers of the State under State ownership, control and maintenance for the public use and benefit and for the increase of public revenue." (First Annual Report of the Power Authority of the State of New York, 1931, p. 43.)

During the following decade the formulation of a State water power policy was a matter of continuing controversy and a series of legislative committees and commissions considered the matter. A Joint Legislative Committee was appointed in 1912 to investigate the entire question. It reported to the Legislature as follows:

> "Your committee hesitates to recommend any specified policy to be adopted by the State in connection with the development of its water powers without further investigation. Having in mind, however, that previous committees of the Legislature, public officials and commissions have recommended such development by and in behalf of the State itself, and that the

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> Legislature of the State has heretofore expressed its approval, your committee feels that this should be the established policy, and that it should be forcefully and fearlessly carried out * * *." (*Id.*, p. 44)

During the First World War certain changes in the utilization of existing Niagara diversions were made at the instance of the Secretary of War, including the termination of the International Paper rights involved here. In connection with these changes Cliff Electrical Distributing Company, The Niagara Falls Power Company and Hydraulic Power Company of Niagara Falls agreed to consolidate and to make better use in joint operation of their existing diversions. Acts of the New York Legislature were sought to authorize this consolidation. (Laws of 1918, Chapters 596 and 597). These acts contained the following proviso:

> "Nothing in this act shall be construed to waive or eliminate any right now vested in the state as to waters now being diverted by any of such corporations so consolidated, or to compensation for said rights." (408)

The Burton Act was extended by the Congressional Joint Resolutions of August 22, 1911 (37 Stat. 43) and April 5, 1912 (37 Stat. 631). On January 19, 1917 Congress passed the first of several joint resolutions authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River (39 Stat. 867). This resolution was extended on June 30, 1917 for a year (40 Stat. 241) and on July 29, 1918 for a further year (40 Stat. 633) and again on July 12, 1919 for an additional year (41 Stat. 163). The last such resolution contained an express proviso:

> "That this resolution shall remain in force until the 1st day of July 1920, and no longer, at the expira-

tion of which time all permits granted hereunder shall terminate, unless sooner revoked, or unless the Congress shall before that date enact legislation regulating and controlling the diversions of water from the Niagara River, in which event this resolution shall cease to be of any further force or effect." (469)

On June 10, 1920, the Federal Water Power Act became law. Here, again, Congress specifically provided:

> "The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted, *or as confirming or otherwise affecting any claim,* or as affecting any authority heretofore given pursuant to law * * *." (Sec. 23 (a))

The words italicized above were added on motion of Senator Wadsworth of New York who described the purpose of his amendment as follows:

> "I have a difficult situation in mind * * * the Niagara Falls situation. It so happens that the rights those companies received there years and years ago, * * * came as grants from the State of New York; and those companies—rightly or wrongly, I do not know which—have claimed, or have indicated that they might claim, certain continuing rights to the diversion of water and the generation of power. It might be said that that claim has been a constantly pending one, but it never has been settled. The Niagara situation always has been uncertain as to its future for that reason. Now, I do not want this bill in any way to confirm that claim. (59 Cong. Rec. 1482)."

Section 9(b) of the Federal Water Power Act also provided that each applicant for a license shall submit:

> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the

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State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this Act."

On March 5, 1923 Governor Alfred E. Smith transmitted a message to the New York Legislature recommending a policy of State development of the power resources of the Niagara and St. Lawrence rivers. He stated that:

"While we have been debating and bickering over the enactment of laws for the progressive development of our great water power under State ownership and control the Federal Government has enacted a Water Power Law which challenges our right, authority and jurisdiction over the navigable waters of our State in all matters relating to power development."

He further recommended that an appropriation be made available to the Attorney General to defray the expenses of an action begun by the State against the Federal Government. (Public Papers of Governor Alfred E. Smith, 1923, pp. 138-141.)

Governor Smith appointed a committee on behalf of the Water Power Commission of the State of New York. On May 10, 1923 a conference was held by this committee with interested Federal officials, including the Secretary of the Interior, the Secretary of Agriculture and representatives of the Federal Power Commission, the Secretary of War and the Solicitor General of the United States. On July 16, 1923, the Committee reported to the Governor on its conference and recommended that the suit be withdrawn in view of assurances obtained from the Federal Power Commission. The remarks of the conferees construing sec-

tion 9(b) were as follows:

"We directed a number of inquiries to the Commission involving its construction of this section. Mr. Saxe, at one point, asked the Commission what its position would be if the New York Commission should grant one application to 'A', and a contestant 'B' then made application to the Federal Commission, would the latter have jurisdiction to grant a license to B instead of to A? Mr. Merrill [Executive Secretary of the Federal Power Commission] answered this question as follows:

Mr. Merrill: 'In the first place, it could not be granted to anyone who had not complied with the requirements of Section 9b of the Federal Act. Assume that only A had done this. The Commission would, nevertheless, under the Act, have authority to say that it will not issue a license to A because it is not satisfied with A's plan.'

Mr. Griffin [Deputy Attorney General of New York]: 'You would not regard it as unreasonable to grant a license to Company B?'

Mr. Merrill: 'They must have such authority from the State as is comprehended within section 9 of our Act,—the right to occupy beds and banks and divert the water, and the right to engage in the work of developing power."

Mr. Griffin: 'They must have first, a license from the State Water Power Commission, and second, satisfactory plans?'

Mr. Merrill: 'If the license from the State covered those items named in the Act.'

Mr. Griffin: 'As I take it, the worst situation that could possibly arise is that there would be a deadlock * * * You would not presume to have authority to settle it for the State over the head of the

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State of New York, and, on the other hand, the State of New York could not settle the question without the approval of your Commission. That is about the substance of it?'

Mr. Merrill: 'Yes * * * I think it would be advisable for the two agencies to confer before acting. That is what we are working for in each of the States'." (Public Papers of Governor Alfred E. Smith, 1923, p. 562, quotations based upon a stenographic record.)

The State Water Power Commission referred to by Mr. Griffin was created under the State Water Power Act of 1921 (now Article XIV of the Conservation Law), which was patterned generally on the Federal Water Power Act of 1920. During the five years following its creation a series of applications by private companies for permission to utilize the State's water power resources were made, notably, an application by The Frontier Corporation for permission to construct power works in the St. Lawrence River. The Frontier Corporation was controlled by interests including The Aluminum Company of America, General Electric Company and The E. I. DuPont de Nemours Company. Ultimately The Frontier Corporation withdrew its application and the State Water Power Act was amended to provide that all licenses issued by the Water Power Commission must be approved by the Governor.

On January 1, 1929, Governor Franklin D. Roosevelt discussed the State water power policy in his Inaugural Address as follows:

"First, it is agreed, I think, that the water power of the State should belong to all the people. There was, perhaps, some excuse for careless legislative gift of power sites in the days when it was of no seemingly great importance. There can be no such excuse now. The title to this power must vest forever in

> the people of this State. No commission, no, not the Legislature itself, has any right to give, for any consideration whatever, a single potential kilowatt in virtual perpetuity to any person or corporation whatsoever." (First Annual Report of the Power Authority of the State of New York, 1931, p. 46)

In February, 1929, the Niagara Falls Power Company, with a view to eliminating the opposition of the State to its efforts to secure additional water diversion at Niagara, entered into an agreement with the State of New York stipulating that it would:

(1) Withdraw all objections to the payment of the rental being charged by the State for existing water, and

(2) Agree to pay such equitable rental for the additional experimental supply as might be determined by the State under the Water Power Act, and

(3) Recognize the necessity of obtaining a license from the State for the use of the experimental water (Id., p. 47).

As described by Governor Roosevelt in a letter to United States Senator Robert F. Wagner, February 9th, 1929:

> "This is a complete recognition of the right and sovereignty of the State of New York to license and rent all water now being used by the company and all wate to be used under the provisions of the convention ana protocol * * *. The stipulation received by the State of New York clears up the matters long in dispute between it and the private company and makes it perfectly clear that the State has the full sovereignty and control over the water on the American side of the Niagara River for all time." (Id., p. 47)

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In 1931 the Legislature enacted the Power Authority Act (Laws of 1931, Chap. 772, now Article 5, Title 1, Public Authorities Law) which declared the St. Lawrence River and its watershed a natural resource of the State and created a public authority charged with the duty to "proceed with the improvement and development of the international rapids section of the St. Lawrence river * * * for the aid and benefit of commerce and navigation and for the development of the hydro-electric power inherent therein."

Thereafter Governor Roosevelt and the Power Authority had negotiations with President Hoover, the State Department and the Army Engineer Corps, which resulted in the so-called Federal-State Accord on February 7, 1933. This provided generally that in any program for development of the St. Lawrence River the State of New York would be responsible for hydro-electric power works and the Army Engineers for navigation works and prescribed a formula for the distribution of costs between the two. The Accord was submitted to the Senate on February 10, 1933. A joint resolution approving the Accord was introduced in the House of Representatives and adopted by the House on April 26, 1933 after public hearings.

Although the navigational works have not yet been approved by the Congress, the Federal Power Commission has granted a license to the New York Power Authority permitting it, in conjunction with the Ontario Hydro-Electric Commission, to construct the hydro-electric works in the St. Lawrence River (F. P. C. Project No. 2000).

The State Power Authority was not charged by law with any duty with respect to the Niagara River in 1931 because at that time all diversions authorized by the 1909 Treaty were under private license. However, the State gave notice that it wished to utilize any additional water which might be made available from the Niagara. Its representatives participated in the Niagara studies by the Federal Power

Commission (*Possibilities for Redevelopment of Niagara Falls for Power Purposes,* Bureau of Power, Federal Power Commission, 1949, pp. 1, 3) and acted as consultants in the negotiation of the Treaty of 1950. (*Annual Report of the Power Authority of the State of New York,* 1949, p. 40.) Although the State has never undertaken to cancel its grants of authority for present Niagara diversions it asserted its title by collecting a rent for the use of the State's waters in the Niagara River. A rental of $400,000 per annum was collected on the excess over 15,100 second-feet as a condition to the consolidation permitted under the Statute of 1918. In 1943 the Legislature authorized the Water Power and Control Commission of New York State to fix a rental on the basic diversion of 15,100 second-feet effective July 1, 1943. (L. 1943, ch. 46; Conservation Law § 614 (13).) An additional rental of $700,000 per annum was fixed and has been collected ever since upon the basic 15,100 second-feet. This rental is reflected in the petitioner's accounts to the Federal Power Commission (39) and has not been challenged in this proceeding.

By the same statute the Legislature declared all waters, over which the State has proprietary ownership of the flow, subject to the power and control of the State "for the purpose of regulating, licensing, controlling or terminating the use and disposition of the same." Governor Dewey stated in approving this bill that—

> "In my Annual Message I expressed it as my hope that as one of the first acts of 1943 it shall be declared by law that the water power resources of the State shall be preserved for the benefit of the people in perpetuity. I also stated that now is the time to make that policy effective by legislation requiring a proper rental for water power use under previously existing authority.
>
> "The Legislature, by this bill, has acted in agreement with my recommendation." (McKinney's Cons. Laws of N. Y., Book 10, n. § 612)

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ARGUMENT

I

The Federal Power Act has not destroyed the rights of the states in navigable streams.

A long series of decisions by this court have expressly confirmed the rights of states of the United States to the use of waters of navigable streams. In *Martin* v. *Waddell,* 16 Pet. 367 (1842), this court stated:

> "For when the Revolution took place, the people of each State, became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution of the general government." (p. 410)

In passing upon the point the court took express notice of the distinction between sovereign and proprietary rights and rights to the soil and the waters, when it stated that the questions were—

> "Whether the dominion and propriety in the navigable waters and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the duke." (p. 411)

In *Pollard's Lessee* v. *Hagen,* 3 How. 212 (1845), the court passed upon the rights of States admitted to the Union after the Revolution. The lands concerned were ceded to the United States by the States of Virginia and Georgia and by the Treaty with the French Republic of April 30, 1803, ceding Louisiana. The court stated:

> "We think a proper examination of this subject will show that the United States never held any

> municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed, except for temporary purposes * * *." (p. 221)

Alabama was admitted into the Union pursuant to a compact which provided "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefore imposed by the said State." The court construed this provision as intended to effectuate the powers granted to Congress under the Constitution "to regulate commerce with foreign nations and among the several States." The court concluded:—

> "This supposed compact is, therefore, nothing more than a regulation of commerce to that extent among the several States, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it." (p. 230)

The principles applicable to inland waters are equally applicable to boundary waters. In *Massachusetts* v. *New York*, 271 U. S. 65 (1926) this court held that the State of New York owned the bed of Lake Ontario within the international boundary.

We do not understand that the Solicitor General here claims that Congress obtained any powers of regulation by virtue of the Boundary Waters Treaty of 1909 beyond those already delegated to it by the Constitution.

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Aside from possible constitutional limitations on the power of Congress which we will not labor, this case presents the question whether Congress has exercised any power to take inland navigable waters from the States. The dissenting opinion in the court below suggests that this taking was accomplished by the Federal Water Power Act of 1920. The Federal Power Commission in its statement of questions presented and specifications of error also relies on the Federal Water Power Act of 1920 to accomplish the supersedure.

The State agrees with the decision of the court below that State laws relating to the use of water power are not superseded but are supplemented by the Federal Power Act.

The State takes no position on the question whether payments to private corporations for water rights are legitimate operating expenses for the purpose of computing amortization reserves. The State contends that it is the sole owner of proprietary rights to the use of waters of the Niagara River and that waters of the river cannot be diverted without its consent whether by license from the Federal Power Commission or otherwise. It regards the Federal Power Act as an assertion of federal regulatory authority under the power "to regulate commerce" and not as the taking of the State's water rights.

There is no language in that Act which supports the conclusion that a taking was intended. We shall point out at a later point in this brief that there are many provisions which indicate the contrary. However, before proceeding to analyze the language of the Act, we shall summarize briefly its history and the legislation which preceded it, because we believe this history makes it entirely clear that the act was not intended to take proprietary rights in navigable waters from the states to vest them in the Federal Government.

Prior to 1899 the Congress of the United States had not asserted any general authority over navigable rivers in the United States. The diversions of water for power purposes from the Niagara River were made pursuant to temporary permits granted by the Legislature of the State of New York and no Federal authority was sought or required for these diversions. In 1899 Congress enacted a general law requiring that a permit be obtained from the Secretary of War before placing an obstruction in any navigable body of water in the United States (Act of March 3, 1899, 30 Stat. 1121, 1151).

The effect of the 1899 statute upon the laws of New York is discussed by Mr. Justice Holmes in *International Bridge Co.* v. *New York,* 254 U. S. 126 (1920), as follows:—

> "The only argument that impresses us and the one that was most pressed is that this is an international bridge, and that Congress has assumed such control of it as to exclude any intermeddling by the State. It is said that the bridge as constructed was and is devoted wholly to international commerce and that when Congress authorized it in that form in 1874 that authority must be regarded as the charter under which it was maintained. Without repeating the considerations urged in support of this conclusion we will state the reasons that prevail with us.—The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by

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the State, still the foundation of a right to use the land at all must be laid by state law. Not only the existence of the Company but its right to build upon New York land came from New York, as was recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built 'in pursuance of' the New York statutes.

* * * * *

"But it is said that a different rule applies to an international stream and that Congress has recognized the distinction by the Act of March 3, 1899, c. 425, § 9, 30 Stat. 1151. It is true that that statute makes a distinction, but the distinction is that bridges may be built across navigable waters wholly within the State if approved by the Chief of Engineers and the Secretary of War, but, with regard to waters not wholly within the State, only after the consent of Congress has been obtained. The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant." (pp. 131-133)

This case dealt with the waters of the Niagara River. This construction of the 1899 statute was reaffirmed by this court in *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138 (1933) in a unanimous opinion.

In 1901 Congress enacted a law (Act of February 15, 1901, 31 Stat. 790, Chap. 372) pursuant to which the Secretary of the Interior granted revocable permits to occupy public lands including the forest reserves.

Under these two statutes, the law of 1899 applying to navigable streams, and the law of 1901 applying to public lands, a power developer could, so far as the Federal Gov-

ernment was concerned, occupy navigable rivers or public lands for the production of power. However since the permits granted both by the Secretary of War and the Secretary of the Interior were revocable, such an occupation was at the risk of a subsequent assertion of Federal authority. Therefore, many power developers sought acts of Congress permitting such occupation in the apparent belief that a congressional permit was irrevocable or at least less readily revocable than one obtained from the appropriate administrative officer.

There was no further general legislation until the General Dam Act of 1906, which again required the consent of Congress before a dam could be constructed in a navigable water. It also required the approval of the project by the Secretary of War and Chief of Engineers, required the grantee to maintain locks, works and other structures which might be required by the Secretary of War and Chief of Engineers, and required the grantee to furnish power for such works and to establish such fishways as the Secretaries of Commerce and Labor might require. In 1908 Congress consented by act to the construction of a dam across the Rainy River. President Roosevelt vetoed this act in a message sent to Congress on April 3, 1908 (42 Cong. Rec. 4698) in which he specified the following conditions, which, in his opinion, should be placed in every grant for the construction of dams across navigable waters:

> "First. The grant should be annulled if the work was not begun and plans carried out in accordance with the authority granted.
>
> "Second. The proper official should see that in approving the plans the maximum development of navigation and power was assured.
>
> "Third. There should be a license fee or charge which, although small and nominal at the outset, could be adjusted in the public interest.

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"Fourth. There should be provision for the termination of the grant at a definite time, leaving the future to determine its course."

In 1909 President Roosevelt again insisted on these conditions in a message vetoing a bill to authorize the construction of a dam across the James River in the State of Missouri (H. R. Doc. 1350, 60th Cong. 2d Sess.).

In 1910 Congress amended the General Dam Act to incorporate some of the provisions insisted upon by President Roosevelt in his veto message.

The 1910 Act went further than the 1906 Act in providing for a comprehensive plan for the development of a river and waterway system and for the consideration of each particular project with a view to the over-all plan of development. It also provided for the termination of grants at the end of fifty years after the approval of projects but did not make any provision for reimbursing licensees for their investments. Those provisions did not prove attractive to developers and a total of only eight dams were constructed under the provisions of the General Dam Acts of 1906 and 1910. (H. Rept. No. 61, 66th Cong., 1st Sess.)

The Federal Water Power Act of 1920 was in form not an original act but an amendment of the General Dam Act of 1910. It was intended to establish a general policy for the authorization of power projects in the United States and to transfer the burden of passing on such projects from the Congress to an administrative body.

The body selected consisted of the Secretary of War, The Secretary of the Interior and the Secretary of Agriculture. These three officials were chosen because the Secretary of War had formerly granted revocable permits in navigable streams, and the Secretary of the Interior had

granted revocable permits in public lands. Where lands of the forest reserve were occupied the permit was also granted by the Secretary of the Interior but was required to be in conformity with administrative regulations of the Secretary of Agriculture, who had general regulatory authority over the forest reserve.

The Act empowered the Commission to issue licenses for the construction of works in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce, or upon any part of the public lands and reservations of the United States, or for the purpose of utilizing surplus water or water power from any government dam (Sec. 4(e)). In other words, it combined jurisdiction already asserted under the 1899 Act and 1901 Act.

The Act, therefore, did not mark a substantial departure from previous congressional policy and administrative practice. It merely combined in one agency the licensing and regulatory powers previously exercised by the Secretaries of War, Interior and Agriculture, gave those officers power to issue licenses for a definite term of fifty years, and elaborated the conditions and requirements upon licensees to stimulate investment and to protect the public interests.

The question of the effect of previous legislation and the Federal Power Act itself upon state proprietary rights was one which was repeatedly discussed and referred to, not only in the veto messages of the presidents but also in the debates of Congress. President Roosevelt explained the sources of congressional power in his veto message on the James River Dam (H. R. Doc. 1350, 60th Cong., 2d Sess.), as follows:

> "My reason for believing that the Federal Government, in granting a license to dam a navigable

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river, has the power to impose any conditions it finds necessary to protect the public, including a charge and a limitation of the time, is that its consent is legally essential to an enterprise of this character. It follows that Congress can impose conditions upon its consent."

President Taft, in a veto message relating to the building of a dam across the Coosa River in Alabama on August 24, 1912 (S. Doc. 949, 62d Cong., 2d Sess.), stated:

"It is said that the grantee, the Alabama Power Co., proposes to spend over a million dollars in the construction of a dam, as well as to furnish toward the project its riparian rights and to stand the expense and cost of the damages by flowage. It is manifestly entitled to be credited for all these expenditures, and is manifestly entitled to a fair, full, and reasonable profit for its investment and work. But after all of these items are fully allowed for it is equally manifest that in the course of time the return from the privilege thus granted in the shape of valuable water power created may far exceed a reasonable return for these items." (pp. 1-2)

During the administration of President Roosevelt, President Taft, then Secretary of War, submitted a report to Congress which declared:

"The Federal Government has no possessory title to the water flowing in navigable streams, nor to the land comprising their beds and shores, and hence Congress can grant no absolute authority to anyone to use and occupy such water and land for manufacturing and industrial purposes. The establishment, regulation, and control of manufacturing and industrial enterprises, as well as other matters pertaining to the comfort, convenience, and prosperity of the people, come within the powers of the States, and the Supreme

> Court of the United States holds that the authority of a State over navigable waters within its borders, and the shores and beds thereof, is plenary, subject only to such action as Congress may take in the execution of its powers under the Constitution to regulate commerce among the several States." (Quoted in *First Annual Report of the Power Authority of the State of New York,* 1931, p. 84.)

It is noteworthy that neither President Roosevelt nor President Taft claimed on behalf of the Government any proprietary rights in navigable waters of the United States. The argument was simply that the waters could not be utilized without the consent of the Federal Government and that it was the duty of the Federal Government to attach conditions to its consent. President Taft agreed that developers were entitled to compensation for riparian rights contributed to a project but felt that the United States should protect against profits which exceeded a reasonable return on such contribution.

In the congressional debates on the Water Power Act two questions more than any other occupied the attention of the Senate and House. The first such question was the provision for payment upon repurchase at the expiration of a license (Sec. 14), and the second question was the amount of annual charge to be paid to the United States by a licensee (Sec. 10). The Act finally adopted retreated from the positions previously taken by the Presidents and the General Dam Act of 1910 on both these points.

In debate, Representative LaFollette, speaking for a majority of the House Committee, defended the present net investment repurchase clause against supporters of the so-called Ferris Amendment. The repurchase clause supported by Mr. LaFollette ultimately carried and is one of the clauses now before the Court. Representative LaFollette made a lengthy statement in which he quoted a

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number of decisions of this Court in support of the proposition that under the act the States retained full proprietary rights, control and authority over their navigable waters.

At one point he described compliance with Section 9(b) as a condition precedent to the procuring of a license in the following language:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of State law as to bed, banks, diversion and use of water, we are most assuredly not infringing any States' rights in that respect, but are definitely insisting that the States' rules of property as to water, bed and banks, must have been fully complied with or license cannot issue."

At another point he said:

> "This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we, as representatives of the States, have authority to act for the States in matters of this character. * * * Under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests. * * *"

Again he said:

> "In this bill the State abrogates none of its powers or rights."

And at a later point—

> "Mr. Chairman, it might be better, as some men seem to think, if all jurisdiction as to water, bed and

> banks of streams was in the Federal Government instead of in the States. If it were so there would be no complication caused by conflicting authority. We, however, have to legislate under conditions as we find them."

Representative LaFollette's comments are annexed as an appendix to this brief. His statement shows that the net-investment repurchase clause was not based upon the theory that the United States owned water rights, but was intended to protect licensees. Under the General Dam Act of 1910, licensees were entitled to nothing at the expiration of the fifty years term, "leaving the future to determine its course." Under the Water Power Act the license continued unless the United States repaid the licensee for his net investment or issued him a new license on reasonable terms (Section 15). Section 15 in its present form was bitterly opposed in the Senate by conservationists (59 Cong. Rec. 1472-75) and Section 14 was opposed in the House of Representatives as too generous to the water power interests (H. Rept. 715, 65th Cong., 2d Sess., Minority Report, pp. 40-46).

When the Water Power Act was before the Senate an amendment was offered to the House bill by Senator Nelson speaking for a majority of the Senate Committee. This amendment limited the annual charges payable to the United States under Section 10(e) to an amount for the purpose of reimbursing the United States for the costs of administration. The bill then before the Senate provided for payment of "reasonable annual charges in an amount to be fixed by the Commission". Senator Nelson objected to the fixing of any charges beyond the cost of administration and posed the following question:

> "Why should the Federal Government charge the people of the States for the use of water which belongs to them, where the development is brought about by the capital of the people of the State?"

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and again—

> "Why should the people of the States be mulcted and made to pay to the Federal Government for property which the Federal Government does not own?
>
> "It cannot be said or denied by any legal authority of this country that, aside from the purposes of commerce and navigation, the use of the water in the several States belongs to the people of the States. If it belongs to the people of the States, why should the government take the property of the people of the States, sell it to them and make them pay for it?"

Senator Norris, answering Senator Nelson, said:

> "I am not going to enter into a controversy with the Senator from Minnesota on the proposition that the water does not belong to the Government of the United States: But I do contend that since the dams cannot be constructed and these water power propositions developed without the consent of the Federal Government, the Federal Government has a legal right and a moral right to grant the concessions on such terms as it may see fit." (59 Cong. Rec. 1431)

In other words, the position of the group led by Senator Norris was the same as that taken by Presidents Roosevelt and Taft, who, as we have seen, did not contend that the value of riparian rights should be disregarded, but believed that the United States could condition its consent to occupation upon the payment of an annual charge which would prevent the earning of excessive profits in the development of water resources. They did not propose to "wipe the slate clean" of riparian rights and regarded questions of title as irrelevant. They felt simply that licenses should be conditioned to prevent an excessive return. Even this view was rejected over and over again by the Senate. Four bills passed by the House

between 1914 and 1916 were defeated in the Senate "due to objections based largely on the ground that Congress has no right to exact a charge for the development of water power and with special reference to power developed on navigable streams" (S. Rept. 180, 66th Cong., 1st Sess., p. 5).

The Nelson Amendment was adopted by the Senate (59 Cong. Rec. 1572-73). The provision finally enacted was a compromise between that contained in the House bill and that urged by Senator Nelson. It provided for payment of reasonable annual charges for the purpose of reimbursing the United States for costs of administration and "for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization, as herein provided, is reached * * *" (Sec. 10(e)).

The provision finally adopted, therefore, accepted the prior right of the states to collect annual charges for the expropriation of excessive profits and provided for annual charges by the United States only where the states themselves took no action. The adoption of this amendment makes clear that the Congress considered that the states retained full proprietary rights in navigable waters and permitted the Federal Government to charge for the use of navigable waters only where the states had not asserted their right.

The Federal Power Commission quotes the statement of Senator Wadsworth regarding Section 23(a) of the Act (Commission brief, p. 47) in support of the proposition that the act was intended to destroy substantive rights under state laws.* Senator Wadsworth's statement was not intended for that purpose but to make clear that

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* The Commission quotes other statements of Senator Wadsworth in its brief at pages 41-42.

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rights asserted by the power company against the State of New York were not to be confirmed by the act. At another point in the debate, Senator Wadsworth discussed with Senator Norris the question of development of the St. Lawrence River, which was also under legislative license to a private corporation. Senator Wadsworth stated—

> "The Supreme Court of the United States, in a case having to do with this very place on the St. Lawrence River, has handed down a decision to the effect that these waters are held in trust for the people of the State of New York and that the Federal Government does not own the waters." (59 Cong. Rec. 1492)*

At a later point Senator Wadsworth contended that even the Federal Government itself could not construct power works in the St. Lawrence without the consent of the State. He stated:

> "I think from former experiments that you will find the attorney general of New York contending against the right of the Federal Government to interpose at all to stop them from developing it, once they get the permit to divert the water in such a way as not to disturb navigation. The State of New York, through its legal representatives, has never conceded ownership of the water in the Federal Government nor any of its control except in so far as that control was necessary to protect navigation. Governors and attorney generals have always said that under the Constitution of the United States, that water was held in trust for the people of New York." (59 Cong. Rec. 1492)

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* Senator Wadsworth may have referred to the decision of this Court in *Long Sault Development Co.* v. *Call*, 242 U. S. 272 (1916).

It is evident that Senator Wadsworth did not understand the act to supersede the laws of New York.

If the debate in the Senate is read in full it will be seen that on almost every amendment the conservationists led by Senator Lenroot were defeated and that the group led by Senator Nelson generally succeeded in retaining its amendments in conference with the House.

The debates in Congress are barren of any suggestion that the Federal Government has any proprietary right in the valuable waters belonging to the states. Despite the extensive discussion of this precise legal issue, nowhere does the act contain any language asserting a superior proprietary right in the United States. The act is regulatory in character and in most respects represents a retreat from, rather than an advance beyond, the positions taken by Presidents Roosevelt and Taft and prior regulatory enactments of the Congress.

The language of the act confirms this interpretation. Section 3(8) defines navigable waters as "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce." If Congress had intended to assert proprietary rights in navigable waters it would have done so here, but instead it referred merely to its power to regulate. Section 3, subdivision 11 in defining "project" includes therein "all water rights, rights-of-way, ditches, dams * * *" If Congress had believed that the only water rights in navigable streams were rights under its license it would have said so here. The fact that water rights are bracketed in the language of the act with rights-of-way, lands and interests in lands, again indicates that the Congress was fully aware of the fact that water rights were valuable assets under State law and did not intend to disturb them.

Section 9 (b) of the act provides that such applicant for a license shall submit to the Commission,

> "satisfactory evidence that the applicant has complied with the requirements of the laws of the State

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> or States within which the proposed project is to be located, with respect to bed and banks and to the appropriation, diversion and use of water for power purposes * * *"

As we have pointed out above, Representative LaFollette, who later suggested an amendment to this section adding the words "bed and banks," regarded this section as mandatory and as "one of the conditions precedent to the procuring of a license" (56th Cong. Rec. 9110).

This Court has held that Section 9 (b) does not require a licensee to conform to regulatory measures of a state, (*First Iowa Co-op* v. *Power Commission,* 328 U. S. 152) and has stated that Section 9 merely relates to securing adequate information for the Commission and does not itself require compliance with any state laws. However, the court has stated that state laws, relating to beds and banks of streams and to rights to divert or use water, remain effective in so far as they have not been superseded by the Federal Power Act (328 U. S. at 178).

At issue here is the question whether the Federal Power Commission can confiscate the proprietary rights of a state in its waters by licensing a private company to use the state's waters. The Commission, as we understand it, has taken the position that its license is the sole source of rights to use waters of the Niagara River. Implicit in that argument is the assumption that the Federal Power Commission can take usufructuary rights belonging to the State of New York without its consent and transfer them to private corporations. Nothing in the Act or in the holdings of this court justifies the conclusion that Congress intended or has the power to deal with the property of a state in this fashion.

Section 27 of the Act declared that—

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any

way to interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Section 3(9) of the Act provides—

"'Municipal purposes' means and includes all purposes within municipal powers as defined by the constitution or laws of the state or by the charter of the municipality."

The use of the word "municipal" in this broad sense follows the rule laid down in *Pollard's Lessee* v. *Hagan*, 3 How. 212, 230, where the court stated:

"This right of eminent domain over the shores and the soils under the navigable waters, for all *municipal purposes*, belongs exclusively to the states within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it." (Italics added)

Regardless of whether Section 27 is construed to protect private proprietary rights under state law, it clearly protects the proprietary rights of New York in the Niagara River.

Under the laws and public policies of the State the waters of the Niagara River are held in trust for the people of the State for recreation, power development and other public purposes. The New York Power Authority is described as a "corporate municipal instrumentality of the state" (*Public Authorities Law* §1002). Since 1895 the State has held title to the bed and banks at the Falls and has maintained the Niagara Reservation. Under these circumstances the laws of the State relate to municipal purposes and are expressly saved from supersedure by the Act. This court has heretofore ruled that water rights

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in the Hudson River, another New York navigable-in-law stream, were expressly saved by Section 27. *Ford & Son* v. *Little Falls Co.,* 280 U. S. 369 (1930).

The Commission attempts to avoid the provisions of the Act by asserting that its licensees are agents of the United States. (See Point I B of the Commission's brief, p. 25.) This argument ignores the unanimous decision of this court in *Broad River Power Co.* v. *Query,* 288 U. S. 178 (1932). In that case a licensee of the Federal Power Commission attempted to defeat a state excise tax by urging that it was a tax upon a federal agency. The court stated—

> "It is apparent, however, that the complainant in generating and selling power is not acting as agent for the government. It acts with the government's permission, and while it may be said to have received a privilege from the government, it is not a privilege to be exercised on behalf of the government." (p. 180)

The court in that case expressly approved the finding of a three judge court below that the purpose of the legislature was "to tax the generation of electric current by the hydro-electric companies which utilize the water power in the rivers of South Carolina, *one of the great natural resources of that State.*" (Emphasis ours) (p. 179)

Congress never intended to take rights from a state and transfer them to a private corporation. It specifically preserved the rights of the states to take over projects under license by condemnation (Section 14). This disposes of any argument that Niagara-Mohawk is a "chosen-agent" of the United States as against the State of New York.

The position which the Commission now takes is a novel one. Before the Court of Appeals, the Commission

argued as follows:

> "II. Under the laws of New York the right to use the water of the navigable Niagara River belongs to the State and is inalienable. The two claimants whose rights are asserted here were not authorized by the State during the period March 1941 through 1946 to use water taken from Petitioner's diversion canal and they do not have valid private rights under State law.
>
> "III. Valid private rights under State laws are subordinate to rights of United States or its permittees to take and use water of the navigable Niagara River for power development. The United States may under Section 14 impose the license condition required here which precludes Petitioner from claiming payments for prospective earnings from water power rights as part of operating expenses or capital cost of this licensed project." (Court of Appeals Brief, p. 4)

The Solicitor General's present position is also inconsistent with that asserted by that official in a memorandum dated September 1, 1951 submitted to the Chairman of the Senate Committee on Interior Insular Affairs, in connection with the Submerged Lands Act then under consideration by Congress. That memorandum was submitted in reply to a memorandum of the attorneys general of various states, contending that the decision of this court in *United States* v. *California,* 332 U. S. 19 (1947), had cast doubt upon the title of the states to their inland waters. He stated—

> "The truth is that not a pint of inland waters or an inch of the lands under such waters is involved or ever has been involved in the controversy over rights in the marginal sea." (U. S. Code Cong. and Adm. News, 1953, No. 9, p. 1449)

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The Congress in approving the Submerged Lands Act in effect confirmed the rights of the states in the water power of their navigable rivers. The report of the House Committee on that act, stated:—

> "This title does not affect any of the federal constitutional powers of regulation and control over these areas within state boundaries. Such powers as those over navigation, commerce, national defense, international affairs, flood control, and power production, where the United States owns or acquires the water power." (House Report No. 215, 83rd Cong. 1st Sess.; U. S. Code Cong. and Adm. News 1950, No. 9, p. 1219)

Here again Congress indicated its understanding that the water power of navigable rivers belonged to the states unless it had been acquired by the United States by construction of a federal project or otherwise.

Yet the argument of the solicitor general in this case is in many respects similar to his argument in *United States* v. *California*. The assertion of federal proprietary rights or a dominion so extensive as to destroy state proprietary rights is based upon the commerce clause instead of upon the power to conduct foreign relations, but the basic premise is the same. The difference between the two cases, as the Solicitor General has heretofore recognized, is that a long line of Supreme Court decisions have expressly stated that the states have rights both of "dominion and propriety" in their inland waters.

The debates of Congress make clear that neither the Federal Power Act nor any of the similar measures which preceded it were intended to destroy these rights, and, in fact, the debates show that Congress was so jealous of those rights that the Act would have been defeated had any other construction of it been suggested.

No doubt the preservation of local rights gives rise to inconvenience of administration and division of authority. That is a penalty of the federal system. A bicameral legislature and an executive veto also lead to division of authority, but such a division may result in sounder legislation and a sounder power program than an absolute concentration of legislative and executive power. The court should not read into the Federal Power Act sweeping purposes for the destruction of the state's interests and proprietary rights where neither the language nor history of the Act justifies such a departure from the long accepted rights of states to their inland waters.

II

Niagara Mohawk Power Corporation has no proprietary rights in the waters of the Niagara River under the law of New York.

The State of New York claims the sole proprietary rights in the flow of the waters of the Niagara River under the law of New York. We shall summarize here the legal bases of the State's claim and the principal authorities in as brief a compass as the subject permits.

A. Niagara Mohawk Power Corporation Has No Rights in the Waters of the Niagara River as a Riparian Owner

The Court below appears to base its opinion upon the view that, "this usufructuary right (to use water for power purposes) is an incident of riparian ownership and does not depend upon grant or prescription" (202 F. 2d at p. 199). This conclusion, while correct under some circumstances, is incorrect as applied to the Niagara River and to the type of diversion carried on by respondent.

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It is an elementary principle of law that the natural flow of a stream cannot be diverted by an upper riparian owner so as to deprive a lower riparian owner of the full flow of the stream. As this Court has stated:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent Com. Sec. 439:
>
> 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate'."
> (United States v. Rio Grande Irrigation Co., 174 U. S. 690, 702 (1898))

Even if Niagara Mohawk had some riparian right to use the water of the river as it flows by the bank, it would not have the right to turn part of the flow into a new channel.

The distinction is clearly stated in *Gould on Waters* (3d ed. 1900) pages 418-419:

> "The distinction is to be observed between the right to divert or change the course of the stream itself so as to turn it away from a lower proprietor, and the

right to take water from the stream. The first is wholly unlawful; the second may be exercised to a reasonable extent."

The Court of Appeals of New York has said in *Kleinberg* v. *Ratett,* 252 N. Y. 236, 239 (1929):

> "The owner of land over or through which a natural stream flows may not divert or dam it back, to the injury of the upper or lower proprietor * * *. It is the latter's right to have the stream come down to him in undiminished flow according to established wont."

Of course, the State of New York utilizes the flow of the Niagara River for recreation purposes by the maintenance of the Niagara Reservation. However, even if the State made no use of this water, an upper riparian owner under New York law could acquire no right of diversion.

The New York law on the subject is stated in *Gray* v. *Village of Fort Plain,* 105 App. Div. 215, 217, 94 N. Y. S. 698 (3rd Dept., 1905) where the Court stated:

> "The plaintiff, as a riparian owner of lands on the stream below the point of diversion, was entitled to the full flow of all the water of the stream, even if he had never yet needed or used it."

See also *Amsterdam Knitting Co.* v. *Dean,* 13 App. Div. 42, 44, 43 N. Y. S. 29 (1897), aff'd, 142 N. Y. 633; *Smith* v. *City of Rochester,* 38 Hun 612, aff'd, 104 N. Y. 674 (1887).

B. The Niagara River is Navigable in Law. The Proprietary Rights Not Only to Its Bed But Also to the Flow of Its Waters Are in the State

The rights of the State of New York to the bed of the Niagara River have been recognized for many years. In *Matter of Commissioners of the State Reservation at*

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Niagara, 37 Hun 537, app. dism., 102 N. Y. 734 (1886), it was stated that the proprietary right from the margin of the Niagara River to the international boundary line is in the State and that the riparian owners have taken only to the waters' edge. The Court distinguished the Niagara River from other fresh water rivers which are not navigable in law, stating:

> "The rule is otherwise in respect to navigable rivers. There the property is in the Sovereign or State, and the riparian owners as against it, for its use, have no proprietary interest or right in the waters as appurtenant to the soil owned by them on the river banks." (p. 546)

Under New York law the Niagara River and the St. Lawrence, Hudson and Mohawk Rivers are placed in a special category. *People* v. *System Properties, Inc.,* 281 App. Div. 433, 120 N. Y. S. 2d 269 (3rd Dept., 1953). The beds of these rivers are not capable of private ownership. As to these streams the State has not merely a power of regulation as sovereign coordinate with that of the United States, but it also has the proprietary right to the bed and flow of the stream.

This rule was applied by the Court of Appeals to the Mohawk, one of the three other navigable-in-law rivers in New York (see *Fulton Light, Heat & Power Co.* v. *State,* 200 N. Y. 400 at 413 (1911)), in *People ex rel. Loomis* v. *Canal Appraisers,* 33 N. Y. 461, 464 (1865):

> "The title to the land or bed of the river, undeniably, carried with it the water that flowed over it."

The rule of the *Loomis* case was reaffirmed in *Danes* v. *State,* 219 N. Y. 67, 75 (1916), where Judge Collin stated:

> "This court held in a thorough and irrefragable opinion that the claim of the relator was erroneous,

and that the title to the bed of the Mohawk River and to the water flowing over it was in the people or state."

Although the Court below cites contrary language in the opinion in *People ex rel. Niagara Falls Hydraulic Power & Manufacturing Co.* v. *Smith,* 70 App. Div. 543, 75 N. Y. S. 1100 (1902), the authority of that case is questionable. The State was not a party to it. The two litigants were a predecessor of the Niagara Mohawk and the tax authorities of the City of Niagara Falls. Niagara Mohawk was in the position of disparaging its own title. The trial court appears to have erroneously assumed that the Niagara River was not a navigable stream at the place involved (70 App. Div. at 546). Since the Court of Appeals wrote no opinion, the basis of its affirmance is in doubt. In a later case dealing with these very waters, the Court of Appeals refused "because the State itself is not a party" to determine "the particular nature and extent of defendant's (*i. e.* Niagara Mohawk's) rights or privileges as acquired from the State or as riparian owner * * *." *Water Power & Control Commission* v. *Niagara Falls Power Co.,* 289 N. Y. 353 (1942).

The same is true of *Hydraulic Power Company* v. *Pettebone-Cataract Paper Company,* 198 App. Div. 644, 191 N. Y. S. 12 (1921), cited by the Court below. That was a controversy between two diverters, neither of whom would benefit by asserting that title was in the State.

C. The 1885 Condemnation Terminated Any Previously Existing Rights of Diversion

The order of the Supreme Court of New York which affirmed the report of the appraisers of the property taken by the State for the State Reservation, described the rights acquired in the following language:

"* * * all the right, title and interest of all persons or corporations of, in and to the premises embraced

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within said boundary lines, including all water rights, made-land (so called) debris, titles or claims (if any) to lands lying under the Niagara River, rights of riparian owners, easements and appurtenances of every name and nature whatsoever, including all the rights of, in and to all streets, or portions of streets, embraced and included within said boundary lines." (Report of the Commissioners of the State Reservation at Niagara, February 17, 1885, N. Y. Sen. Doc., 1885, No. 35, p. 15)

Since the area taken lay between the intake and discharge works of respondent and since respondent's diversions were not immediately terminated, respondent has argued that the State Reservation was servient land and was taken subject to its rights. These facts do not support that conclusion. The principal purpose of the acquisition was to acquire, protect and preserve the Niagara Falls. If the State took subject to servitudes of upstream riparian owners, the asset acquired would not serve the purpose for which it was to be used. The Attorney General of New York has expressly ruled that Niagara Mohawk's predecessor acquired no riparian rights as against the State (1895 Op. N. Y. Atty. Gen. 322).

D. The Statutes of New York Relied Upon by Niagara Mohawk Power Corporation Do Not Grant Perpetual Rights But Are Permits Revocable at the Will of the State

None of the New York statutes relied upon by respondent purported to grant perpetual rights nor in fact a title of any character. By their language they grant permission to the corporate recipient to construct works on lands in the Niagara River and to divert waters therefrom.

The Legislature could not have granted any title to these properties because Article III, Section 20, of the State Constitution requires the assent of two-thirds of the mem-

bers of each branch of the Legislature to appropriate public property and several of these statutes did not achieve that majority.

The basic statutes limited the corporate existence of the companies to a term of fifty years and this period has already expired. Although the corporate life of the company has been extended, that has been accomplished under a statute which specifically reserves all State rights to the bed and waters of the Niagara River.

Aside from these considerations and others which need not be mentioned here, the limited character of these grants is evident from the fact that under New York law the Legislature has no power to grant away to private parties the reserved rights of the State in these waters. In a closely analogous situation, the Legislature of the State purported to grant to a private corporation a right to dam the St. Lawrence River for water power purposes. The Attorney General of New York ruled that the statute was unconstitutional, and a subsequent Legislature repealed it. When the matter was presented to the Court of Appeals of the State of New York it sustained the Attorney General and the Legislature in *Matter of Long Sault Development Co.*, 212 N. Y. 1 (1914), stating:

> "As long as the waters are maintained as navigable they remain public waters of the State; and as long as they remain public waters of the State the State is bound to retain control over them in the public interest."

More recently it was stated in *Matter of City of Syracuse* v. *Gibbs*, 283 N. Y. 275, 283 (1940):

> "It was the duty of the State to control and conserve its water resources for the benefit of all the inhabitants of the State. The public right to the benefit of such resources is an incident of sovereignty * * *.

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Whatever the City got by the statutes upon which it relies was subject to the reserved powers of the State, to control in the public interest, the use of the waters of the lake."

The Court of Appeals stated with respect to the waters involved here in *Niagara Falls Power Co.* v. *Water Power and Control Commission*, 267 N. Y. 265 (1935):

"The privileges and rights granted to the power company were taken subject to this (reserved) right of the State and also subject to the control of Congress." (p. 276)

Again it was stated in *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696, 57 N. Y. S. 2nd 777 (Sup. Ct., Albany, 1945):

"No one would doubt that the state could interfere with the plaintiff's riparian rights, or even destroy them in the interest of navigation in the river. And it is not very much more doubtful that if the state has the power to act in the preservation of public water in the public interest that it may do so in the direction of preserving to the people the energy of Niagara Falls by a clearly expressed statute for that purpose regardless of the rights it may have previously created, permitted or allowed in these waters. I do not think the issues presented by this case can be met on any other or narrower ground than this.

* * * * *

Niagara Falls is one of the prime natural resources of the state. It can scarcely be believed that the Legislature in granting rights to use its energy, and the company's predecessors in accepting the rights given, believed that this natural resource was being placed for all time by the crystalization of contractual

> obligations beyond the control of the people of the state. The companies and the Legislature in their arrangements were bound as reasonable men to anticipate, and I think they did anticipate, that the 'title' to the perpetual use of a natural resource of the very first magnitude might be disavowed by differently minded men in future times, by men who might feel that resources of this kind are inalienable and who would be unwilling that another generation bind them irrevocably in the use to be made of them."

See also *Coxe* v. *State,* 144 N. Y. 396 (1895); *People* v. *System Properties, Inc.,* 281 App. Div. 433, 120 N. Y. S. 2d 269 (3rd Dept., 1953).

A similar conclusion was reached by this Court in *Illinois Central Railroad Company* v. *Illinois,* 146 U. S. 387 (1892). Of course, the Federal Power Act would not prevent the State from taking over the diversion now carried on by Niagara Mohawk because that right is expressly reserved to states and municipalities in Section 14.

International Paper Co. v. *United States,* 282 U. S. 399 (1931), does not in any way limit these conclusions. The State of New York was not a party in that case and the extent of rights under state law was not material to the holding made. The statement of the Court that the Niagara Falls Power Company "was the owner so far as the law of New York could make it owner of land and water rights" involves no inconsistency because, as we have shown, all that the State of New York could grant was a temporary permit.

The fact that Niagara Mohawk Corporation pays an annual rent to the State of New York for the use of waters of the Niagara in itself establishes that the State is the owner of the right to use these waters and that no vested right as against the State has been acquired.

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Conclusion

The State submits that in the determination of this proceeding the Court should hold that Niagara Mohawk Corporation has acquired no proprietary rights in the waters of the Niagara River under the laws of the State of New York and should further hold that the proprietary rights of the State of New York in the waters of the Niagara River have not been superseded by Act of Congress.

October, 1953.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York.

Appendix

Remarks of Representative La Follette
56 Congressional Record 9109-9111

Mr. Chairman, before touching on these essential propositions I have mentioned, I desire to say that the gentleman from Oklahoma [MR. FERRIS], who filed the minority report, and the chairman of the committee [MR. SIMS] are evidently proceeding under an entirely different assumption of fact and theory for the creation of this bill and the Government's relationship to it, than does the Member who is now addressing you. They seem to approach it from the viewpoint of the Government being a supreme proprietor and we, as legislators, working out a plan whereby she can provide for development, through private individuals, of her properties. The gentleman from Oklahoma, on the last page of the reports from committee on this bill, among other things, says:

I deny that it is the correct principle for the Federal Government to first grant away the most valuable of all its resources, and then by ponderous, cumbersome, provisions make its recapture and retaking nonfeasible if not impossible.

Mr. Chairman and gentlemen, I would be the last man in this House to raise a question as to the soundness of that enunciation if I thought the gentleman had even a questionable legal right for his assumption. I know these gentlemen to be honest and earnest in their desire to safeguard from their viewpoint the people as a Federalized Government. But, Mr. Chairman, after a careful and painstaking study of the Constitution of the United States, and after reading most carefully many United States Supreme Court findings and decisions, as well as many State court decisions, I have been compelled to conclude that the Federal Government's having any proprietary rights superior to any other riparian owner, with the

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exception of freedom from taxation, in what the gentleman designates as "the most valuable of all its resources," is romance, pure and simple.

Mr. Chairman, we have here the Constitution of the United States. I am very desirous of instruction and information. I will be pleased for the gentleman from Oklahoma, or any other gentleman who shares his ideas as to the Federal Government's proprietary rights, to kindly call to my attention the particular article and section of the Constitution that confers on the Federal Government any proprietary rights in the streams, lakes, or harbors of the United States, or any amendment to the Constitution that does so. It is true that under Article IV, section 3, paragraph 2, we find the following language:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, or of any particular State.

But, Mr. Chairman, the Supreme Court, in decision after decision, has enunciated the opinion that this provision of the Constitution does not imply nor show that the Federal Government has any proprietary rights as to water, or to bed or bank, of any stream in these United States, either in navigable or nonnavigable streams. In the House Manual and Digest, under the paragraph of the Constitution which I have just read, there are some 38 United States Supreme Court citations, many of them touching on this very question of proprietary rights. In Martin *v.* Waddell (16 Pet., 410), Chief Justice Taney said in part:

When the Revolution took place the people of each State became themselves sovereign, and in that character hold absolute right to all their navigable waters and the soils under them for their common use, subject only to the right since surrendered by the Constitution to the General Government.

In the case of Pollard, lessee, v. Hagan (3 How., 229), the court, after quoting the above statement, said:

Then, to Alabama belong the navigable waters and soils under them in controversy in this case, subject to the rights surrendered by the Constitution to the United States, and no compact that might be made could diminish or enlarge these rights.

The court concludes the opinion in that case in these words:

By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States, respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Thirdly, the right of the United States to the public lands and the power of Congress to make all needful rules and regulations for the sale and disposition thereof conferred no power to grant to the plaintiffs the land in controversy in this case.

Mr. Chairman, there are dozens of Supreme Court decisions upholding the States' sovereignty and right of control of the water, beds, and banks of navigable and nonnavigable streams, lakes, and tidal bays. The very latest Supreme Court decision on this question contains in part this language: (October term, 1916, 243 U. S., 316. Syllabus. United States *v.* Cress. United States *v.* Kelly et al. Error to the District Court of the United States for the Eastern District of Kentucky. Nos. 84, 718. Argued Dec. 13, 1916. Decided Mar. 12, 1917.)

The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks (Barney *v.* Keokuk, 94 U. S.

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324, 338; Packer *v.* Bird, 137 U. S. 661, 671; Hardin *v.* Jordan, 140 U. S. 371, 382; Shively v. Bowlby, 152 U. S. 1, 40, 58; St. Anthony Falls Water Power Co. *v.* St. Paul Water Commissioners, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (Shibely *v.* Bowlby, 152 U. S. 1, 40; Gibson *v.* United States, 166 U. S. 269, 272; Scott *v.* Lattig, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the fifth amendment against the taking of private property for public use without just compensation (Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336; United States *v.* Lynah, 188 U. S. 445, 471).

This decision was rendered March 12, 1917, and fully sustains the States' power and sovereignty over water, bed, and banks of all character of streams.

Decisions by the hundred can be produced to sustain the contention that section 3, paragraph 2, of Article IV, of the Constitution, infers no such proprietary rights in the Federal Government. The syllabus of the case known as Kansas *v.* Colorado (206 U. S., 46-92), expresses the situation and status of the United States clearly and succinctly. It reads in part:

The Government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of the powers granted is to be found in that alone; that the manifest purpose of the tenth amendment to the Constitution is to put beyond dispute the proposition that all the powers not granted are reserved to the people, and that if in the changes of the years further powers ought to be possessed by Congress they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the Territories

and may control the flow of waters in their streams, it has no power to control a like flow within the limits of a State, except to preserve or improve the navigability of the stream; that the full control over these waters is, subject to the exception named, vested in the State.

And later on it says:

It is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.

Mr. Chairman, Article I, section 8, paragraph 3, contains what is known as the commerce clause of the Federal Constitution, which reads:

[Congress shall have power] to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

It is under that provision that we concede the Government's power and right to maintain jurisdiction over navigable waters of the United States for the purposes of navigation and the improvement thereof; and that clause confers no property rights whatever upon the United States, nor does it confer any supervisory right upon the United States for any other purpose than that of navigation, a contention, Mr. Chairman, that has been decided affirmatively for so long a period that it is needless to enlarge on it. The United States is simply the trustee of the States, to preserve and see that the general navigation rights of all are equally protected, and, when necessary, improved to insure the usableness of those avenues of commerce and trade "with foreign nations, between the States, and with the Indian tribes." This and nothing more.

This, Mr. Chairman, brings me back to my first premise: That we should understand the genesis of this legislation; the reason for its coming into being and need for its enactment.

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We have for many years been trying to develop more or less power from rushing or falling water in many States of the Union, and many power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States, the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation.

It is true that some of the States have granted such rights, and dams have been built, and their legality upheld by the courts, and there have been many interesting questions raised and decisions rendered; but time forbids my going into that phase of this question.

Building dams and developing water powers is usually a hazardous and costly undertaking. Men will not engage in it on uncertainties. Consequently with indefiniteness of tenure and occupation created by dual or divided authority but little development has been made. Under pressure for something to be done to make development possible the Interior Department, without any legal status other than the act of February 15, 1901, United States Statutes, chapter 372, "relating to rights of way through certain parks, reservations, and other public lands," put into effect a system of revocable permits where such lands were involved. The gentleman from Oklahoma, in his minority report, refers to our operating under that system. It would have been interesting had he seen fit to put in a table showing how many such permits have been granted, how many so-called horsepower have been developed under that system, and how many millions of dollars have been in-

vested subject to the revocation at will by some political appointee. He did not do so, and I think he himself would have been surprised had he made an investigation. For all practical purposes there has been no development whatever under that system; any plants built under such a system necessarily being restricted to those whose projectors had their own capital or could give other security than the plant if they borrowed money for the enterprise. The law referred to as appertaining to navigable streams also hampers, but would not deter capital as does the one where the lands above the bank are public domain. Court decisions can be found justifying the belief that the Government would not be allowed to revoke licenses at will, but only where navigation needs were imperative making the destruction of the plant a necessity—a remote possibility. The builders would naturally build in such a way as to make that risk a negligible quantity. However, there has been little development under that provision of law. Capital demands and will have certainty of tenure and definite assurances as to its human liabilities. To expect anything else is unwarranted and not justified by commercial principles and practices of the decades and centuries gone by.

This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. Our not having greater development is inexcusable on any other ground than lack of grasp of the situation and inability to cope with it. This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict

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navigation, but rather to benefit it. The commission is composed of the Secretary of War, who has supervisory control over all navigable streams for the purposes of navigation alone; the Secretary of the Interior, who has control of the public domain and of the power sites on such domain; and the Secretary of Agriculture, who has administrative control of all power sites in forest reserves. The three working together can harmonize all questions involving Federal interests, and under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue.

I think legislation of this character is wise and worthy of fair trial in view of the fact that under present conditions no development is possible. I think the legislation will prove to be sound in principle and sane in provisions as it comes from the committee, and, what is of transcendent importance, it will, with possibly one or two changes, stand the test as to constitutionality. Unless it will pass that test, to pass it would be futile.

Is the passing of this kind of legislation good public policy? I think it is. There has been a widespread demand for State and National supervision over all natural and national resources. The Government is attempting to apply that principle to the resources of various kinds on and in the public domain. Various bills have been introduced, some of which have passed either the House or the

Senate, and in one case—Alaska coal lands— both, for the leasing of oil deposits, coal deposits, phosphates, and sodium, and so forth. By the enactment of this bill we shall be able to develop our water powers, recognizing the States' rights as to water, bed, and bank control. Their public-utilities commissions will control the matter of rates charged for service, and the plants will be entirely subject to State laws as to taxation, and so forth.

Under this bill the State abrogates none of its powers or rights. Section 9 distinctly provides that satisfactory evidence must be given that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this act.

Mr. Chairman, I propose at the proper time to offer to amend this paragraph, page 35, in line 4, after the word "to," by adding the words "bed and banks and," so it will read:

Satisfactory evidence that the applicant has complied with the law of the State or States within which the proposed project is to be located with respect to bed and banks and the appropriation, diversion, and use of water for power purposes—

And so forth.

If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue.

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Mr. Chairman, it might be better, as some men seem to think, if all jurisdiction as to water, bed, and banks of streams was in the Federal Government instead of in the States. If it were so there would be no complication caused by a conflicting authority. We, however, have to legislate under conditions as we find them.